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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 73, Original

STATE OF CALIFORNIA
Plaintiff,

v.

STATE OF NEVADA
Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF SPECIAL MASTER'S REPORT

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PLAINTIFF'S BRIEF IN SUPPORT OF SPECIAL MASTER'S REPORT

JURISDICTIONAL STATEMENT

This case is an original action in which the Court has jurisdiction under Article III, Section 2, Clause 2 of the Constitution and 28 United States Code, section 1251.

STATEMENT OF THE CASE

At issue in this case is the proper placement of the boundary between California and Nevada—a line beginning at the Oregon border and extending south through rocky mountains and juniper and sagebrush covered valleys to Lake Tahoe where, at its intersection with the 39th parallel, it makes an oblique angle and continues southeasterly in a straight line to the intersection of the 35th parallel and the Colorado River. Its approximate

location is depicted in exhibit A to California's original complaint in this action, a copy of which is attached as exhibit A to this pleading.

The discovery of apparent inaccuracies in that part of the line extending from the Oregon border to the 39th parallel in Lake Tahoe, described in this proceeding as the "north-south" line, (e.g., exhs. 12, 165, 169, 172) led to the filing of a complaint by the State of California. It requested this Court to declare that the line as surveyed in 1872 by A. W. Von Schmidt pursuant to contract with the General Land Office be declared to be the lawful boundary between California and Nevada from the Oregon border to the 39th parallel at Lake Tahoe, on the basis of its recognition in fact by both states and the federal government since its initial placement.

An amicus brief was subsequently filed by then California Assemblyman Mike Cullen urging that a new survey of the north-south boundary be ordered to achieve an astronomically accurate placement using modern and more precise methods.

Concurrently, Nevada was granted permission to file an amended answer and counterclaim raising several alternative lines and putting into issue the location of the remainder of its boundary with California—the so-called "oblique" boundary commencing at the 39th parallel and extending southeasterly to the intersection of the 35th parallel with the Colorado River. Nevada urged a number of alternative claims:

1. Adoption of the earlier, 1863 Houghton-Ives line as the lawful boundary to the extent it was surveyed from

Oregon to a point approximately 102 miles south of Lake Tahoe, and its continuation by new survey to the Colorado River;

2. Establishment of a new line by surveying due south from a point identified by Daniel G. Major in 1868, as the intersection of the 42nd parallel with the 120th meridian, and then proceeding southeasterly from the 39th parallel to the intersection of the 35th parallel and the Colorado River;

3. Establishment of the entire Von Schmidt line from the Oregon border to the Colorado River as the lawful boundary;

4. Adoption of the 43rd meridian west from Washington rather than the 120th meridian west of Greenwich from the Oregon border to the 39th parallel, and extension from the intersection of this line with the 39th parallel southeasterly to the intersection of the 35th parallel with the Colorado River; and

5. If, and only if, all of the above alternatives prove unacceptable, confirmation of the line presently recognized on the ground as the legal boundary (i.e., the Von Schmidt line as the north-south boundary, and a line established by the United States Geodetic Survey in 1893–1899 as the oblique boundary).

Exhibits B and C hereto represent approximate locations of these lines with respect to the north-south and oblique boundaries.

California then filed its Reply and Amended Complaint denying Nevada's newly-asserted claims and urging that in the event the court should reject the Von

Schmidt line as the north-south boundary, and the Coast and Geological Geodetic Survey line as the oblique boundary, new surveys be ordered.

Concurrently, California filed a motion requesting permission to file an amended complaint joining the United States as a party for the purpose of clarifying the ownership of several thousands of acres of lands affected by the boundary controversy. It was proposed in California's motion that the proper location of the interstate boundary be first determined, and that the court then retain jurisdiction for subsequent consideration of the effect of such determination on titles along the border. A similar concern with titles was expressed by amicus California Land Title Association, which filed a brief suggesting possible solutions.

The Special Master then filed his report, summarizing the voluminous body of evidence received at the hearings on the matter and recommending, in substance, that:

1. The boundary between the states be determined and established as the Von Schmidt line from the Oregon border to the 39th parallel, and the United States Coast and Geodetic Survey line along the oblique boundary to the intersection of the 35th parallel with the Colorado River as determined by compacts between Arizona-Nevada and California-Arizona;

2. The states be given the opportunity to determine by agreement the proper intersection of the north-south and oblique lines in Lake Tahoe. In the absence of such agreement, the Special Master should be empowered to

hold further hearings and make recommendations with respect to such placement;

3. The Special Master should be empowered to arrange for a survey in the event parties are unable to agree upon the marking of either of the Von Schmidt or United States Coast and Geodetic Survey lines on the ground;

4. California's motion for leave to file a second amended complaint and bifurcate issues with respect to ownership of disputed lands on the California-Nevada boundary should be allowed; and

5. The Special Master should be authorized to confer with the parties and the United States Solicitor General's Office with respect to questions raised by California's motion concerning possible interests of the United States in this proceeding and to make recommendations "for such other and further relief as the Court may deem proper including recommendation as to the quieting of title to any lands, if needed."

California supports the recommendations of the Special Master and respectfully urges their adoption by this Court.

STATEMENT OF THE FACTS

Alta California, newly acquired from Mexico in 1848, was a vast and sparsely settled expanse of land covering what are now the states of California, Nevada, Utah, most of Arizona, and parts of New Mexico, Colorado, and Wyoming—an estimated 448,691 miles. Exh. 70; Goodwin, The Question of the Eastern Boundary of California

in the Convention of 1849, 16 Southwestern Historical Quarterly 227, 230 (Jan. 1913). It did not remain so long. With the discovery of gold in the same year, pressures developed that led inexorably to statehood in 1850. California was never a territory of the United States. Enriched by the revenues from vast gold deposits and populated by a huge influx of fortune hunters, it became a state virtually overnight.

A. California's boundaries were defined *definitively in its Constitution of 1849*

In the Compromise of 1850, Congress admitted a state bounded on the north by Oregon and the 42nd parallel, on the east by the 120th meridian and an oblique line extending from Lake Tahoe to the Colorado River, and on the south by Mexico. These are the boundaries given the new State of California; boundaries that Congress would be powerless to change without California's consent. E.g., *Washington* v. *Oregon* (1908) 211 U.S. 127, 131; *Louisiana* v. *Mississippi* (1905) 202 U.S. 1, 40.

The description of these boundaries appears in California's Constitution of 1849 which was approved by Congress on September 9, 1850. Act of Sept. 9, 1850, ch. 50, 9 stat. 452, exh. 6. It describes her eastern boundary as:

> ". . . Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred-twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred-twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line in a southeasterly direction to the River Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river, to the boundary line between the United States and Mexico, as established by the treaty of May thirtieth, one thousand eight hundred forty eight; . . . ." Cal. Const. of 1849, art. XII (1853), Cal. Comp. Laws at 584; exh. 5.

On the same date that California was admitted to the

Union, Congress created the territory of Utah. The organic act defined the new territory's boundaries in relevant part as follows:

> "That all that part of the territory of the United States included within the following limits, to wit: *bounded on the west by the State of California*, on the north by the territory of Oregon, and on the east by the summit of the Rocky Mountains, and on the south by the thirty-seventh parallel of north latitude, be, and the same is hereby, created into a temporary government, by the name of the Territory of Utah; . . ." Act of Sept. 9, 1850, ch. 51, 9 Stat. 453; exh. 13, emphasis added.

In 1861, the Territory of Nevada was created out of Utah. The organic act defined its boundaries as follows:

> "[B]eginning at the point of intersection of the forty-second degree of north latitude with the thirty-ninth degree of longitude west from Washington; thence, running south on the line of said thirty-ninth degree of west longitude, until it intersects the northern boundary line of the Territory of New Mexico; *thence due west to the dividing ridge separating the waters of Carson Valley from those that flow into the Pacific; thence on said dividing ridge northwardly to the forty first degree of north latitude*; thence due north to the southern boundary line of the State of Oregon; thence due east to the place of beginning . . . *'Provided,' That so much of the territory within the present limits of the State of California shall not be included within this Territory until the State of California shall assent to the same by an act irrevocable without the consent of the United States*: . . ." Act of Mar. 2, 1861, ch. 83, 12 Stat. 209; exh. 14; emphasis added.

A number of efforts to include part of California in the new Territory of Nevada were made. In 1861, the Nevada territorial government sent a commission to the State of California for the purpose of obtaining the cession of the part of California east of the crest of the Sierra Nevadas. Exhs. 28, 29. Nevada renewed its appeal to California and the United States Congress for the Sierra Nevada crest boundary in 1862. Exhs. 15, 31, 43, 44. Congress responded by adding a degree of longitude to Nevada's eastern boundary. Exhs. 15, 16, *supra*, 22.

The Legislature of California refused to cede the territory. It was believed that such act would require a constitutional amendment enacted by popular vote and that such amendment would be extremely difficult to accomplish. Exhs. 30, 43.

Nevada became a state and was admitted to the Union by Act of Congress and subsequent Presidential Proclamation on October 31, 1864. Exhs. 18, 20. The act and proclamation approved the Nevada Constitution, which provided in part:

> "The boundary of the State of Nevada shall be as follows: Commencing at a point formed by the intersection of the thirty-eighth degree of Longitude west from Washington with the thirty-seventh degree of north latitude; thence due West along said thirty seventh degree of north latitude *to the eastern boundary line of the State of California; thence in a northwesterly direction along said eastern boundary line of the State of California to the forty-third degree of longitude west from Washington; thence*

north along said forty-third degree of west longitude, and said eastern boundary line of the State of California to the forty-second degree of north latitude; . . . *'And furthermore Provided,' that all such territory, lying west of and adjoining the boundary line herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this state.*" Nev. Const. art XIV, § 1; exh. 19; emphasis added.

As previously indicated, a number of efforts were made to include parts of eastern California within the Territory of Nevada. By conditionally extending Nevada's boundary to the crest of the Sierras subject to California's approval (exhs. 14, 19), Congress had shown its recognition of the established doctrine that it was powerless to take territory from a state without its consent. Nevertheless, the Nevada Territorial Legislature proceeded to act as if the boundary had been changed by creating a new county, actually located in California, within a restless border valley. Nev. Stat. 1861, ch. 6, pp. 37–39.

The confusion that ensued led to a full-fledged battle. The Honey Lake Valley, a fertile basin north of Lake Tahoe and approximately 10 miles west of the presently marked boundary, was settled by Peter Lassen and Isaac Roop in 1853. Isolated from California by heavy snows four months a year, its residents were independent from the start. In 1856, 20 of them met and passed a resolution declaring "[i]nasmuch as Honey Lake Valley is not within the limits of California, the same is hereby declared

a new territory . . . to be named Nataqua." Nataqua was Paiute for "woman." The settlers claimed a total of 37,000 square miles of territory, including seven Nevada counties and western parts of three more. Their eastern boundary was to be the 118th meridian, and the California line their western line. Aiken, The Sagebrush War, the California-Nevada Boundary Dispute on the 120th Meridian, unpublished thesis, Univ. of Oklahoma (1971); Mack, Nevada, 399–403 (Clark ed. 1936); Hinkle, Sierra-Nevada Lakes, 110–152 (Bobbs-Merrill); exh. PPPP.

California's Plumas County, claiming the Honey Lake Valley as part of it, responded swiftly by creating "Honey Lake Township" and appointing a justice of the peace to preside there. The unfortunate gentleman was promptly described as "odious" and "destitute of qualifications" by the Honeylakers, who reaffirmed their conclusion that their valley was not within California and appointed a committee to wait on the newly appointed justice and "politely inform him that the citizens of this valley can dispense with his services." Aiken, *supra.*

History does not record whether the residents of Honey Lake Valley were prompted by an honest concern for geographical niceties or more opportunistic instincts. As immigrant parties came down the Lassen Trail, they were met by the local residents, who bartered provisions for their thin, travel weary horses and cattle. The livestock thus obtained was apparently fattened up for resale the following year. It was reported that tax collectors from both Plumas County and Salt

Lake City were met with the same response; they were advised they were in the wrong jurisdiction. *Ibid*; Mack, *supra,* 399–400.

The situation might well have been resolved with time, but for the intervention of the newly created territory of Nevada in 1861. Nevada's governor organized Roop County within Honey Lake Valley, appointing a sheriff and a justice of the peace, who promptly issued an injunction prohibiting his Plumas County counterpart from exercising his office. When that gentleman refused to obey the order, he was arrested and fined for contempt. When news of this reached Susanville, county seat of Plumas County, the judge there issued warrants for the arrest of the Roop County justice and sheriff for interfering with justice. Aiken, *supra*; exh. 54.

The Plumas County sheriff duly proceeded to arrest the two officers but was thwarted by the arrival of seven armed men posted by Isaac Roop. He left for reinforcements, and returned with a posse of 90 men, who found the supporters of Roop County fortified in a log house which they had christened "Fort Defiance." After a siege of several days during which the Roop County justice was wounded in the thigh, an armistice was agreed, and the governors of California and Nevada territory were asked to decide the boundary issue. Governor Leland Stanford of California appointed a commissioner to confer with the acting governor of Nevada, Orion Clemens. They agreed that two commissioners should be appointed to establish the boundary between the two states, although California's represent-

ative observed in the process that the difficulties had arisen from the "inconsiderate and hasty action" of the Nevada territorial legislature in organizing a county in territory which California had never agreed should go to Nevada. Exhs. 54–59; Aiken, *supra.*

Their effort led to authorization for the first survey of the California-Nevada boundary to be marked and posted on the ground: the Houghton-Ives survey of 1863. Cal. Stat. 1863, ch. 402; Nev. Stat. 1864, pp. 139, 308. This survey, which showed Honey Lake Valley to be unquestionably part of California, was accepted by both states until it was superseded by the 1872 Von Schmidt Survey. Aiken, *supra*; exhs. 72–73., Cal. Stat. 1864, ch. 455; Nev. Stat. 1865, ch. 31. Nevada's statute expressly anticipated the forthcoming Von Schmidt Survey. It contained a promise stating "Nothing in this act shall be construed to prevent another and different line from being established as the boundary between the two states."

Similar confusion existed along the oblique boundary, where the town of Aurora was claimed as the county seat of both Esmeralda County, Nevada, and Mono County, California. Furthermore, its citizens elected representatives to both the California and Nevada legislatures in 1862. Interestingly enough, both persons became the speaker, of their respective bodies. Swackhamer, Political History of Nevada 102 (6th ed. 1974); exh. 70.

A number of surveys were conducted in these early years. Principal among them, and most relevant to this case, are the 1863 Houghton-Ives Survey of the north-

south boundary; Daniel Major's 1867 Survey of the Oregon border; the 1872 Von Schmidt Survey of both north-south and oblique boundaries, and the 1893–1899 survey of the oblique boundary conducted by the United States Coast and Geodetic Survey.

B. Surveys of relevancy to the north-south boundary controversy

1. *The Houghton-Ives line*

The first survey of the northern segment of this boundary was one undertaken jointly by both states in 1863. California Surveyor General J. F. Houghton and Butler Ives, who was appointed commissioner for the Nevada Territory, joined in this survey which extended from the Oregon border to approximately 103 miles southeasterly of Lake Tahoe. This line, known as the "Houghton-Ives Line," was adopted by statute in both states (exhs. 72, 74); but it was observed for only ten years when it was superseded by a survey by A. W. Von Schmidt in 1872–1873. Exhs. 101–106, 135–138.

2. *Daniel G. Major's Survey of the Oregon-California boundary*

In 1867, under congressional authorization, the General Land Office contracted with Daniel G. Major to survey the boundary common to Oregon and California. Exh. 96. In 1868, as part of the survey, Major set a monument at a point he determined to be the intersection of the 42nd parallel of north latitude with the 120th meridian of longitude west of Greenwich.

3. *The Von Schmidt line*

A new survey of the boundary between California and Nevada was commissioned by the General Land Office in 1872, and completed in 1873. This survey, conducted by A. W. Von Schmidt, covered both the boundary from the intersection with the 39th parallel north latitude in Lake Tahoe to the Oregon border and the "oblique" portion from Lake Tahoe southeasterly to the intersection of the 35th parallel of north latitude with the Colorado River. This survey was accepted by the General Land Office in 1873 (exh. 130) and the amendment of the plats of public land surveys to conform with the new line was ordered. Exhs. 110, 111, 113, 134.

The portion of this survey north of Lake Tahoe, for which the plaintiff contends, is the presently marked and posted boundary between California and Nevada and has been observed by both states for over 100 years. Defendant's Response to Plaintiff's Second Request for Admissions, No. 69.

C. Surveys relevant to the oblique boundary

1. *The Von Schmidt Survey of 1873*

As previously indicated, A. W. Von Schmidt surveyed the entire California-Nevada boundary. However, reports of error in both the north-south (exhs. 161, 169, OOOO) and oblique (exhs. 114, 152, 153, 155-157, 161, 170-172, OOOO) lines led to the initiation of a new survey of the oblique boundary in 1893.

2. *The survey conducted by the United States Coast and Geodetic Survey—1893 through 1899*

Because of reports that errors existed in the "oblique" portion of the Von Schmidt Survey, Congress authorized the United States Coast and Geodetic Survey in 1893 to perform a new survey of this portion of the boundary. Exhs. 152, 153, 155, 162. Since the completion of this survey in 1899, the "Coast and Geodetic Survey Line" has been used and relied upon by both states and the "oblique" boundary. It was adopted by statute by both states in 1901 (California) and 1903 (Nevada), although Nevada repealed its statute since commencement of this litigation. Exhs. 177, 178, 183, MMMMM.

D. Nevada selections made within California

Although the Von Schmidt boundary was accepted by the General Land Office in 1873 (exhs. 135, 138, 150) and Nevada recognized this fact (exhs. 135–137, 138), Nevada continued to select internal improvement lands in reliance on the earlier Houghton-Ives line, and the United States continued to approve such selections.

The record in this proceeding shows erroneous selections (primarily of internal improvement lands) by Nevada within the State of California as follows:

1. *Prior to May 1, 1873*

Prior to May 1, 1873, the State of Nevada selected 2,138 acres from Lake Tahoe north that were within the State of California as its boundaries are delineated by the "Von Schmidt" line. Affidavit of Fred Sledd, exh. 238. Although most of this land was patented to private in-

dividuals, several parcels are still held by the State of Nevada. Exh. 209.

2. *After May 1, 1873*

The United States General Land Office and its successor, the Bureau of Land Management, continued to ratify and approve selections by the State of Nevada within California as delineated by the Von Schmidt line (a line established and accepted by the United States May 1, 1873) after it had accepted the Von Schmidt line as the California-Nevada boundary. E.g., exhs. 209, 232; Defendant's Answers to Plaintiff's Second Set of Interrogatories 49, 50, with exhs. From Lake Tahoe north to the Oregon border, some 1,484.60 acres were released by the United States without authority of law to the State of Nevada even though this land was located in the State of California by federal survey contracted for and accepted by the United States. Exhs. 209, 236–238. Although Nevada was aware of this practice, it blithely continued to sell lands which it unlawfully acquired from the public domain to private individuals. See Nevada Surveyor-General's Report of 1911, p. 27; exh. 232.

Although our researches with respect to the oblique boundary from Lake Tahoe southeasterly to the Colorado River are not completed, it is anticipated that similar findings will be made with respect to Nevada selections there. We have already discovered that some 2,000 acres of land directly south of Lake Tahoe were unlawfully selected by the State of Nevada with the approval of the United States. Exh. 237; see the Department of Interior's decision *In re Pellkofer*, exh. 216.

This situation will be exacerbated, of course, if as Nevada urges, a new survey is to be ordered from the point established by Daniel Major on the California-Oregon border. See Defendant's counterclaim, count II. Plaintiff's researches of the California-Nevada selections indicate that if a "Major's line" were to be surveyed, the title to some 34,040 acres of land from Lake Tahoe to the Oregon border selected by California from the public domain or granted to her as school lands and approved by the General Land Office would be in question. Along the border from Lake Tahoe southeasterly to the Colorado River, 13,894 acres would be similarly in jeopardy. See exhs. 209, 238.

QUESTIONS PRESENTED

A. North-south boundary

1. Was the "Von Schmidt line" lawfully observed and subsequently accepted by both states as their lawful boundary?

2. Has the "Von Schmidt line," which is the presently marked and posted boundary from Lake Tahoe and Oregon and which has been observed by both states for over 100 years, been established as the boundary between California and Nevada by the doctrine of acquiescence?

3. Should the earlier Houghton-Ives line of 1863 be re-established as the interstate boundary notwithstanding its rejection and abandonment in 1873?

4. Should an entirely new boundary be created by

surveying a projection due south from the point determined by Daniel G. Major to be the intersection of the 120th meridian of longitude with the 42nd parallel of latitude to the point of intersection of such projection with the 39th parallel of latitude even though Major's determination was made solely as part of a survey of the boundary between *Oregon* and California and no line was ever surveyed south from it?

5. Should a new survey be performed, using modern methods capable of fixing positions with unprecedented accuracy?

6. In the event a resurvey should be determined to be necessary, should it locate the 120th degree of longitude west of Greenwich as provided in California's Constitution of 1849 or the 43rd degree of longitude west of Washington as suggested in Nevada's Constitution of 1864?

B. The "oblique" boundary

1. Is the line set by the United States Coast and Geodetic Survey during the years 1893–1899 which is the presently marked and posted boundary lawfully surveyed and accepted by both states as their boundary?

2. Did the Coast and Geodetic Survey line, which was statutorily recognized and observed by both states for 78 years become the boundary between California and Nevada by the doctrine of acquiescence?

3. Is the earlier but discredited and long-superseded Von Schmidt Survey from Lake Tahoe southeasterly to the Colorado River the boundary?

4. Should the partially surveyed Houghton-Ives line

southeasterly of Lake Tahoe, which was never completed or used by either state, be extended to the Colorado River thereby creating a new boundary?

5. Should a new boundary be created by surveying a projection from the point identified by Daniel Major in 1867 as the intersection of the 120th meridian and the 42nd parallel due south to the 39th parallel of latitude and then southeasterly to the intersection of the 35th parallel of latitude with the Colorado River?

C. Should there be a new survey of both lines using modern technology?

D. Where should the north-south and oblique boundaries be joined in Lake Tahoe?

E. Assuming the validity of the presently recognized lines, what is the status of the more than 5,000 acres of land invalidly selected by Nevada within California?

Exhibits A, B, and C show approximately the geographical positions and the respective lines at issue and are set forth in the appendix herein.

SUMMARY OF ARGUMENT

California's eastern boundaries were fixed in her 1849 Constitution, never to be changed without her consent. Although in her early days as a territory and state, Nevada made several efforts to persuade California to cede lands east of the Sierras to her; these efforts were never successful.

A number of surveys were made along the California-Nevada border. These efforts, made under unfavorable conditions and often with inadequate equipment, finally culminated in the lines which were accepted by both states in 1873 (with respect to the boundary from Lake

Tahoe to Oregon) and 1901 (Lake Tahoe to the Colorado River), and have been observed by them ever since. They should be declared by this Court to constitute the lawful boundaries between California and Nevada.

Should this Court decline to find that the presently marked and observed lines constitute the lawful boundary, a new survey should be ordered to fix precisely the location of California's constitutionally-set eastern border.

Assuming this Court declares that the present lines constitute the lawful boundary, the Special Master should be authorized to hold further conferences and hearings on the legality of selections made by Nevada within the State of California. The United States should be invited to participate in these proceedings inasmuch as the apparently unlawful selections were made with her acquiescence and approval. The rights of the two states, the federal government, and purchasers from Nevada should be determined with respect to such selections, inasmuch as opinions of this Court and the Department of the Interior indicate that patents resulting from such extra-territorial selections may be invalid.

ARGUMENT

I

THE VON SCHMIDT SURVEY OF 1873 AND THAT OF THE COAST AND GEODETIC SURVEY OF 1893–1899 MARKED THE INTERSTATE BOUNDARIES

A. The United States has authority to survey the boundaries of states, and has often done so in the past

As the Special Master observes, there appears to be no

authority for the proposition that the United States lacks the authority to survey the boundaries of states. Special Master's Report 46. Indeed, all the authority is to the effect that federal surveys of the public domain may be repeated and altered without limit so long as there is no interference with the rights of others. *U.S.* v. *State Investment Co.* (1924) 264 U.S. 206. The record of history shows no distinction with respect to the validity of surveys made by the United States and those made by others. E.g., *Louisiana* v. *Mississippi, supra*, 202 U.S. 1, 57. Indeed, it appears that both California and Nevada clamored for a federal survey, and welcomed it once it was performed. Exhs. 45–50, 62, 80–85, 155–156, 163–164. Two motives are apparent for this enthusiasm. The most obvious is economy. The surveys performed were costly and dangerous. They covered rough territory and required extensive supplies, equipment and, to some extent, protection from unfriendly Indians. The second is that they facilitated the disposition of the public domain, and in the halycon days of the late nineteenth century, the public lands were in great demand. E.g., Dunham, Some Crucial Years of the General Land Office, 1875–1890, reprinted in the Public Lands, Carstensen, Ed. (1968); Townely, Management of Nevada's State Lands, 1864–1900, 17 Journal of the West 63 (Jan. 1978); Dunham, Government Handout, A Study in the Administration of the Public Lands 1875–1891 (1941); Nash, The California State Land Office 1858–1898, 27 Huntington Library Quarterly 347 (1964).

B. The Von Schmidt line was accepted by both California and Nevada since its initial establishment in 1873. It has been observed ever since that date as marking the north-south boundary between the states

Nevada's objections to the Von Schmidt line at this time seem hollow when compared to the acceptance which that line won within that state in the 1870's. Anticipating the completion of the Von Schmidt Survey, the Nevada Surveyor General reported:

> "Thus it will be seen that, by the munificence of the General Government, that [sic] within a year the State will be inclosed by an actual surveyed line and monuments, and the troubles heretofore existing, to State and county officials, in dealing with an imaginary line, will be entirely and forever obviated.
>
> "This department, more particularly perhaps than any other, feels the immediate necessity of established State lines. In the selection and sale of lands, it is important to know beyond a doubt that they are within this State, otherwise much confusion, trouble, and delay must necessarily be the result." Rep. of the Surveyor General and State Land Register of the State of Nevada for the years of 1871 and 1872, exh. 114.

The Nevada State Controller promptly recognized the new line, exhibit 136, and the Legislature utilized it in redefining Nevada County boundaries. Exh. 137. Nevada has candidly admitted that the Von Schmidt line is the one presently marked and posted between the two states, and as the Special Master points out that its state and local agencies have uniformly observed it. Special Master's Report 35–36; Defendant's Answers to Plain-

tiff's First Set of Interrogatories, Nos. 9–11. The fact that neither state took steps to repeal its previous statutory recognition of the outmoded Houghton-Ives line until recently (i.e., exhs. 72, 74, 76) may cast enough doubt to warrant requesting the intervention of this Court, but not enough to change the logical conclusion that the presently-marked boundaries were accepted by the states and remain in effect.

C. The oblique boundary as surveyed by the Coast and Geodetic Survey in 1893–1899 was promptly accepted by both states. Their acceptance was manifested both in practice and by statute

The Coast and Geodetic Survey line was not only accepted in fact by both states upon its completion (Special Master's Report 36–37) but was accepted by statute as well; at least until Nevada took steps to repeal its recognition after filing her counterclaim in this action repudiating the line. Special Master's Report 36; exhs. 177, 178, MMMMM.

II

THE LINES PRESENTLY MARKED ON THE GROUND AND OBSERVED BY THE STATES MARK THE LAWFUL BOUNDARIES BY ACQUIESCENCE

The Special Master has eloquently outlined the principles of acquiescence, and concluded that these principles are applicable to the case at hand. Special Master's Report 41–48. As he points out therein:

> ". . . Nevada has admitted that both states have exercised since 1873 and continue to exercise jurisdiction and sovereignty up to the Von Schmidt

north-south line, and that it has not requested a resurvey of this line. By statute California adopted the U.S. Coast and Geodetic Survey's oblique line in 1901 and Nevada adopted it in 1903. The line has been in use ever since with both states exercising jurisdiction and sovereignty up to it. Thus the doctrine of prescription and acquiescence becomes applicable here." *Id.*, at p. 45.

The observation of this Court in *Indiana* v. *Kentucky*, cited by the Special Master in his report, is particularly applicable here:

> "It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. . . . On that day, [date of statehood] and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. . . .
>
> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to

be overcome, except by the clearest and most unquestioned proof. . . ." *Indiana* v. *Kentucky* (1890) 136 U.S. 479, 509–510.

The facts considered by this Court in *New Mexico* v. *Colorado* (1925) 267 U.S. 30, are strikingly similar to those demonstrated in this proceeding. They include the impositions of the burdens of citizenship such as the collection of taxes and the requirement of jury duty service (*Virginia* v. *Tennessee* (1893) 148 U.S. 503, 524; *Missouri* v. *Kentucky* (1870) 78 U.S. (11 Wall.) 395, 402; *Indiana* v. *Kentucky, supra*, 136 U.S. 479, 510; *Maryland* v. *West Virginia* (1909) 217 U.S. 1, 41) acts of jurisdiction extending the benefits of citizenship to persons in the area such as the right to vote in statewide and local elections, the right of access to the courts, the improvements of roads, highways and public buildings, the provision of police and fire protection, and the provision of schools. *Virginia* v. *Tennessee, supra*, 148 U.S. 503, 524; *Maryland* v. *West Virginia, supra, Missouri* v. *Kentucky, supra; Michigan* v. *Wisconsin* (1926) 270 U.S. 295, 307; *Vermont* v. *New Hampshire* (1933) 289 U.S. 593, 616. The court has also considered the establishment of county and other district boundaries on the basis of the line to which jurisdiction is asserted (*Missouri* v. *Iowa* (1849) 48 U.S. (7 How.) 660, 677; *Indiana* v. *Kentucky, supra*) and the court has considered in almost every case whether or not public lands were claimed by the state and were granted to private parties on the basis of the line. *Maryland* v. *West Virginia, supra,* 217 U.S. 1, 41; *New Mexico* v. *Colorado, supra*, 267 U.S. 30, 41; *Missouri*

v. *Kentucky, supra*, 78 U.S. (11 Wall.) 395; *Louisiana* v. *Mississippi, supra*, 202 U.S. 54; *Massachusetts* v. *New York* (1926) 271 U.S. 65; *Michigan* v. *Wisconsin, supra*, 270 U.S. 295; *New Mexico* v. *Texas* (1927) 275 U.S. 279, 298; *Vermont* v. *New Hampshire, supra*, 289 U.S. 593, 614. Also considered are acts by a state specifically identifying the boundary and placing the neighboring state on notice of the claim of sovereignty such as court decisions defining the boundary and the identification of the boundary or official maps. *Indiana* v. *Kentucky, supra*, 136 U.S. 479; *Ohio* v. *Kentucky* (1973) 410 U.S. 641, 648–649; *Louisiana* v. *Mississippi, supra*, 202 U.S. 54, 55–58; *Arkansas* v. *Tennessee* (1940) 310 U.S. 563, 568.

The length of time required to ripen acts of jurisdiction into a substantive right is not a set period. In *Rhode Island* v. *Massachusetts* (1846) 45 U.S. (4 How.) 590, the possession under the claim of rights had lasted 200 years. However, in *Missouri* v. *Iowa, supra*, 48 U.S. (7 How.) 660, the court made a finding of acquiescence by Missouri in the claims of Iowa over a period of only 30 years. In most cases, the period of time sufficient to support application of the doctrine has been less than 100 years. *Virginia* v. *Tennessee* (85 Years); *Maryland* v. *West Virginia* (70 years); *New Mexico* v. *Colorado* (54 years); *Missouri* v. *Kentucky* (42 years); *Indiana* v. *Kentucky* (70 years); *Louisiana* v. *Mississippi* (90 years); *Michigan* v. *Wisconsin* (75 years); *New Mexico* v. *Texas* (75 years); *Vermont* v. *New Hampshire* (120 years); *Massachusetts* v. *New York* (140 years); *Arkansas* v. *Tennessee* (115 years); *Ohio* v. *Kentucky* (150 years). The duration re-

quired seems to depend upon the extent to which the states and the private parties have relied upon the line.

A temporary break in the use of line will not prevent operation of the doctrine. Thus, it appears that the presently established boundaries, accepted and acquiesced in by Nevada for so many years, should be confirmed. Indeed, these were the publicly expressed views of a former Nevada Attorney General. Exh. 42.

A. Over 100 years of acquiescence compel the conclusion that the accepted and agreed-on boundary between the 39th and 42nd parallels of north latitude is the "Von Schmidt line"

1. *The Von Schmidt line of 1872 has been respected by California, Nevada and the United States as the interstate boundary north of Lake Tahoe from the time of its approval by the General Land Office in 1873 to the present*

The presently marked and the posted boundary line between the States of California and Nevada north of Lake Tahoe is the line surveyed and monumented by A. W. Von Schmidt in 1872. Since 1873, both California and Nevada have exercised and continued to exercise political jurisdiction and sovereignty up to this line. No other line has been observed in fact by either state since that time. The State of Nevada has admitted, in its response to Plaintiff's Second Request for Admissions, No. 69, that the presently marked and posted boundary line between the two states north of Lake Tahoe is the line surveyed and monumented by Von Schmidt in 1872.

Furthermore, Defendant State of Nevada has indicated in its responses to plaintiff's interrogatories that its state and local agencies have uniformly observed the

presently posted and marked boundary line since their creation. The defendant's responses to these interrogatories are summarized as follows:

a. The Nevada Highway Patrol Division uses and relies upon the presently marked boundary in the performance of its duties; it has done so since its creation in 1949; it has not exercised jurisdiction west of the Von Schmidt line except in cases of hot pursuit; it has not resisted the exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 9, 10, 11.

b. The Nevada Department of Highways uses and relies upon the presently marked boundary and has done so since its creation in 1917; it has not constructed nor maintained highways or roads nor otherwise exercised its powers west of the Von Schmidt line; it has never resisted the exercise of jurisdiction by California between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 12, 13, 14.

c. The Revenue Division of the Nevada Department of Taxation uses and relies upon the line indicated on maps of general distribution which is assumed to be the presently marked and posted boundary line; it has used the Von Schmidt line since it was surveyed as far as that agency's records indicate; it has not required a place of business located west of the presently posted boundary line to register or otherwise comply with the excise tax laws of Nevada because of that location and it has not

resisted the assertion of jurisdiction by California up to the presently posted and marked line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 15, 16, 17.

d. The Nevada Division of State Lands uses and relies upon the presently marked and posted boundary line; it has never resisted the exercise of jurisdiction and ownership by the State of Californa in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 18, 20.

e. The Nevada Department of Education uses and relies upon the presently posted and marked line; it has done so since the department was created in 1956; and it has not performed any act or exercised its powers west of the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 21, 22.

f. The Nevada Department of Forestry uses and relies upon the presently marked and posted boundary line; it has done so since the division was established in 1952; it does not contend that it exercises its jurisdiction west of the Von Schmidt line except pursuant to agreements with the supervisors of the United States National Forests pertaining to firefighting services on United States forest lands; it has never resisted the exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 24, 25.

h. The Nevada Gaming Commission and State Gam-

ing Control Board have relied upon and used maps of general distribution which are assumed to indicate the presently posted and marked boundary line for purposes of establishing their jurisdictions; they have done so since the board was created in 1955; they are not aware of ever having licensed a gaming establishment west of the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 27, 28.

i. The Washoe County Assessor uses and relies upon the presently marked and posted boundary line; it has never assessed property, collected property taxes or otherwise exercised its powers west of the Von Schmidt line; it has never resisted the acts of assessment or collection of property taxes by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 29, 30, 31.

j. The Washoe County Registrar of Voters uses and relies upon the presently posted and marked boundary; it has done so since 1948. Defendant's Responses to Plaintiff's First Set of Interrogatories, No. 32.

k. The Washoe County Sheriff's Office uses and relies upon the presently posted and marked boundary line; it has never resisted the exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 34, 35, 36.

l. The Washoe County School District uses and relies upon the posted line as presently marked on the ground for school district purposes; it has not attempted to en-

force truancy laws west of the present boundary line. Defendant's Response to Plaintiff's First Set of Interrogatories, No. 37.

m. The Washoe County Department of Public Works uses and relies upon the presently posted and marked boundaries; it has not built nor maintained public works nor otherwise exercised its powers west of the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 39, 40.

n. The Nevada Department of Motor Vehicles uses and relies upon the presently posted and marked boundary; it has not performed acts nor otherwise exercised its powers west of the Von Schmidt line; it has not resisted exercise of jurisdiction by California in the area between the Houghton-Ives and the Von Schmidt lines. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 48, 49, 50.

o. The Nevada National Guard uses and relies upon the presently posted and marked boundary line; it has been the line adopted by the United States Geographical Survey which has been adopted by the Army Map Service, Corps of Engineers, United States Army, Washington, D.C.; it has not performed acts or otherwise exercised its powers west of the Von Schmidt line but for joint firefighting operations; it has not resisted exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 52, 53, 54.

Further official recognition by the State of Nevada of

the Von Schmidt line, as its western boundary from Lake Tahoe to the Oregon border, may be seen in the following official maps:

1. Nevada Map Atlas, produced by the Nevada State Highway Department in cooperation with the United States Department of Transportation quadrangle maps Nos. 1-12, 2-12, 3-12, 4-12, 5-12, 6-12, and the Mount Rose quadrangle and Carson City quadrangle. Exh. 139. Defendant has admitted in its response to Plaintiff's Second Request for Admissions, No. 86(J), that these quadrangle maps represent the location of the northern segment of the boundary between California and Nevada as the line surveyed by Von Schmidt in 1872.

2. The Washoe County Engineer's Taxation Boundaries Map No. 16, 1979. Exh. 207.

3. The Washoe County Engineer's Taxation Boundaries Map No. 70, 1975. Exh. 208.

B. The "oblique" boundary between California and Nevada should be established as the United States Coast and Geodetic Survey line accepted by both states in fact and in law since its establishment in 1900

The States of California and Nevada in 1901 and 1903 respectively, legislatively adopted the United States Coast and Geodetic Survey's surveyed line as their true correct and legal boundary line between the 39th and 35th parallels of latitude. Exh. 177, Stats. 1901, ch. 73; exh. 178, Nev. Stats. 1903, ch. 15; Defendant's Answers to Plaintiff's Second Request for Admissions, Nos. 60(a), 61. Both states also currently recognize the United States Coast and Geodetic Survey surveyed line as their mutual boundary along the "oblique" line in their respective statutes. Stats. 1978, ch. 369; exh. 76, *supra;* Nev. rev.

Stats. 1977, vol. 9, tit. 19, ch. 234, exh. 183. Moreover, both California and Nevada in their respective interstate compacts with the State of Arizona, adopted the point established as the intersection of the 35th degree of north latitude with the Colorado River set by the 1899 Coast and Geodetic Survey as their mutual boundary. Nev. Stats. 1960, ch. 119, exh. 179; exh. 185, Interstate Compact, California and Arizona, March 12, 1963; exh. 184, USGS Technical Bulletin 27, August 1965. The United States Government consented to both of the aforesaid interstate compacts. Exh. 181, 75 Stat. 93 (1961); exh. 180, 80 Stat. 340 (1966). Furthermore, defendant has admitted in its response to California's Second Request for Admissions, No. 57(a), that the point established as the intersection of the 35th degree of north latitude with the Colorado River by the 1899 Coast and Geodetic Survey is identical with the points set forth in the 1961 Arizona-Nevada Boundary Compact and the 1966 Arizona-California Boundary Compact.

The interstate "oblique" boundary line presently marked and posted on the ground is the line surveyed by the United States Coast and Geodetic Survey. Defendant has admitted this fact in its Response to Plaintiff's Second Request for Admissions, No. 62.

Defendant has admitted that the Nevada Department of Motor Vehicles, the Nevada National Guard, the Nevada Department of Resources and the Nevada-Tahoe Regional Planning Agency all use and rely upon the presently posted and marked boundary in the exercise of their duties. Defendant's Response to California's Second Request for Admissions, No. 67.

Nevada has admitted that this line has been adopted by the United States Geological Survey, the Army Map Service, the Corps of Engineers, and the United States Army. Defendant's Response to California's Second Request for Admissions, No. 68.

The defendant has further admitted that the following Nevada state and local agencies have utilized the United States Coast and Geodetic Survey "oblique" line since its initial establishment: the Nevada Department of Taxation, Revenue Division, the Nevada Division of State Lands, the State Lands Registrar, the Nevada Highway Patrol Division, the Nevada Department of Highways, the Nevada Department of Education, the Nevada Department of Forestry, the University of Nevada and the Nevada Gaming Commission and State Gaming Control Board. Defendant's Response to Plaintiff's Second Request for Admissions, No. 63.

Defendant has admitted the the County Assessors of Esmeralda, Douglas, Lyon, Mineral, Nye, Clark, and Ormsby have recognized the United States Coast and Geodetic Survey "oblique" boundary line in assessing and collecting property taxes and that the sheriffs of these counties have accepted the above line in the exercise of their jurisdiction. Defendant's Responses to Plaintiff's Second Request for Admissions, Nos. 64, 65.

And she has admitted that the Department of Public Works of these counties have not built or maintained public works, nor have they otherwise exercised jurisdiction west of the United States Coast and Geodetic

Survey line. Defendant's Response to Plaintiff's Second Request for Admissions, No. 66.

The United States Post Office delineated the United States Coast and Geodetic Survey line as the boundary between California and Nevada in its Post Route Map of the States of California and Nevada published in 1917. Exh. 204, *supra;* Defendant's Response to Plaintiff's Second Request for Admissions, No. 87(b). Defendant has admitted, in her Response to Plaintiff's Second Request for Admissions, No. 87(a) that the United States Coast and Geodetic Survey line is depicted as the interstate boundary line in the following Nevada State Highway Department Quadrangle Maps: 7-12, 8-11, 8-10, 9-9, 10-8, 10-7, 11-7, 11-6, 12-5, 12-4, 13-4, 13-3, 14-3, and 14-2. Exh. 139, *supra,* Nevada Map Atlas.

III

THERE IS NO BASIS IN LAW OR FACT FOR CREATING A NEW LINE BY PROJECTING SOUTH FROM THE POINT DETERMINED BY DANIEL G. MAJOR TO BE THE INTERSECTION OF THE 120TH MERIDIAN OF WEST LONGITUDE WITH THE 42ND PARALLEL OF NORTH LATITUDE SOUTH TO THE 39TH PARALLEL OF NORTH LATITUDE AND THEN FURTHER PROJECTING SOUTH-EASTWARD TO THE INTERSECTION OF THE COLORADO RIVER WITH THE 35TH PARALLEL OF NORTH LATITUDE

In count II of her counterclaim, the defendant asks this Court to devise a boundary by connecting with lines three points: A point set by Daniel Major in connection with the survey of the Oregon-California boundary; the

unlocated point where a line drawn due south from Major's point would intersect the 39th degree north latutude; and a point allegedly set by Lieutenant Joseph C. Ives at the Colorado River. There is no legal authority for the establishment of such a boundary in this way.

The argument that establishment of a monumented point creates an interstate boundary line was directly considered and rejected in *Oklahoma* v. *Texas* (1925) 272 U.S. 21. Texas argued that its common boundary with Oklahoma along the north-south segment of the panhandle should be established as a line running due north from a point known as the Kidder Monument set by a surveyor commissioned by the Department of the Interior to set the point of intersection of the true 100th meridian with the South Fork of the Red River and adopted by Congress as such. The court rejected the argument of Texas and ordered a resurvey using more accurate modern techniques. *Id.,* at p. 49.

Furthermore, defendant has failed to present any facts which would indicate any other basis for a decree establishing such a line as the boundary. There has been no evidence offered to show that either state has used such a proposed line.

Notwithstanding the lack of legal foundation for this proposed line, there is evidence which shows that Daniel Major's location of the intersection of the 42nd parallel of latitude with the 120th meridian of longitude was found to be inaccurate. In 1867, Congress authorized the Commissioner of the General Land Office to contract for a survey of the Oregon-California boundary.

14 Stat. 457, 465; exh. 95. Based on this authority, the General Land Office contracted with Daniel G. Major, United States Astronomer and Surveyor, to perform the survey of the border common to California and Oregon. Pursuant to his contract, Major agreed to establish, by astronomical observations, the 42nd parallel of north latitude at the point of intersection with the 120th meridian west from Greenwich and survey and mark the parallel west to the Pacific Ocean. Exh. 96, Major's contract, October 1, 1867. Therefore, the purpose for which Daniel Major was employed was to determine the boundary between California and Oregon and not the boundary between California and Nevada.

Major's contract indicates that he was instructed to determine the intersection of the 42nd parallel with 120th meridian by means of astronomical observations. He was not instructed to determine the location of the 120th meridian by means of time signals or the use of a telegraph, which at that time was considered to be the most accurate means for determining longitude. Exh. 98, Report of Commissioner of General Land Off. to Sect. of the Interior (1870), pp. 463–466. Although there is no evidence to indicate that a telegraph was available to Daniel Major at a place close to the 42nd parallel, had this been essential to his survey, it would have been feasible, although possibly more expensive, to make arrangements with the Central Pacific Railroad to take telegraphic readings in the vicinity of Verdi, Nevada, as Professor Davidson did a few years later. The defendants have admitted, in response to Plaintiff's Second Re-

quest for Admissions No. 29, that Major did not use a telegraph in determining his astronomic positions.

A number of comments and assessments have been made relating to the accuracy of Major's observations. James T. Gardner, in his Notes on the California Boundaries (exh. 77), describes the method by which Major established an observatory and took observations at Camp Bidwell and made his way to the point at which he determined was the intersection of the 42nd parallel with the 120th meridian. He states that Major took no observations at this terminal point. This fact, coupled with the fact that he had noted a connection with some of the measurements of line marks of the Houghton-Ives Survey of the 120th meridian, and thereby became aware of a discrepancy (exh. 98), between his previous survey, would seem to indicate that had the establishment of this particular corner been essential, observations would have been taken at the point Major determined to be the location of the 120th meridian or at least some other confirmatory observations would have been made.

The discrepancy between the Houghton-Ives Survey and the location by Daniel Major of the 120th meridian was pointed out by the Commissioner of the General Land Office in his report of 1870 to the Secretary of the Interior. He suggests that the matter could better be resolved by utilizing a telegraph at the point of intersection at the 120th meridian of longitude with the line of the Central Pacific Railroad. Exh. 98, *supra.*

Francis S. Landrum, defendant's expert witness,

makes the following assessments of Daniel Major's location of the corner in question:

> "The present appraisal of Major's line, a century later, shows that he ran a mediocre to average survey, considering the conditions under which he worked and further considering that his line was 'open end'—that is, it did not return upon itself to supply a means of checking. However, others have done much better." Nev. exh. PPPP, *supra,* at p. 45.

Mr. Landrum further explains his opinion as to the source of Daniel Major's error. He states:

> "To try to understand Major's apparent discrepancy, one must recall that the Greenwich and Washington meridians were regarded as being *exactly* 77° apart, when in reality there were 03′ 02″.3 more than 77° apart. Major's observational records continually refer to Washington *and* Greenwich meridians. Comparing data: Major missed the Greenwich line 03′ 41″.5; Washington and Greenwich differ by an integral number of degrees plus 03′ 02″.3. If the difference (39.2″ of longitude) is translated to *time* in longitude, it is 2.61 seconds. If 2.61 seconds of time in longitude is further translated to a timing error in moon transit, it is in the order of $^{9}/_{100}$ths of a second. To Major's astronomical efforts at Camp Bidwell must be assigned either of two criticisms, vis: (a) he missed a determination of a Washington meridian by less than $^{1}/_{10}$th of a second observational error; or (b) 1,965 lunar and stellar transits with his ironbased spy glass were unfirmly wrong." *Id.,* at p. 53.

Discrepancies between the Houghton-Ives Survey and the Daniel G. Major Survey relating to the location of the 120th meridian led to the Von Schmidt Survey.

Soon after Daniel G. Major completed his survey of the 42nd parallel of latitude in which he had located the intersection of the 120th meridian of longitude therewith, discrepancies were noted between the location of this intersection or corner determined by Major and the corner located by the previous Houghton-Ives Survey. The Secretary of the Interior, in his report to Congress in 1870, pointed out that on review of Daniel Major's field notes, computations and map a considerable discrepancy was found in longitude between the monument fixed by the two survey expeditions for the northeast corner of the State of California. Exh. 98, *supra,* Rep. of Sect. of the Interior to Cong. 1870. In 1871, the Commissioner of the General Land Office, in his report to the Secretary of the Interior, indicates that the survey work of Daniel Major in locating the northeast corner of California in 1868, raises serious doubt as to the accuracy of the earlier Houghton-Ives line. He goes on to state:

> "So great a discrepancy ought not, therefore, to pass unnoticed; and since the survey of 1863 has never been recognized by Congress as the true boundary line between California and Nevada, it is deemed of the highest importance that a new determination of the point of intersection of the one hundred and twentieth meridian with the thirty-ninth parallel, and a resurvey of the boundary to its intersection with the forty-second parallel of north latitude, be ordered by Congress." Exh. 101, Rep. of Comr. of the Gen. Land Off. (1871), pp. 21–22.

As Francois D. Uzes, expert witness for plaintiff,

points out in his report to the California State Lands Commission, when the Federal Government became aware, in about 1870, of the difference in position between the 1863 line and the point set by Daniel Major in 1868 as the northeast corner of California, it contracted with A. W. Von Schmidt to survey the entire eastern boundary of California. Exh. 12, *supra,* Cal.-Nev. Boundary, State Lands Commission, March 25, 1977; exh. 102, letter, Drummond to Von Schmidt, July 11, 1872; exh. 103, letter, Drummond to Von Schmidt, August 2, 1872; exh. 133, Von Schmidt contract, 1872. This, of course, was authorized by an appropriation by Congress. Exh. 104, 17 Stat. 347 (1872) at p. 358. As pointed out above, the discrepancy between the Houghton-Ives Survey and the corner located by Daniel Major caused the Surveyor General of the State of Nevada in his report to the Governor to state:

> "An error was discovered in the established initial point of the western boundary between this State and California, of so great a magnitude as to induce Congress to pass an Act, approved June tenth, eighteen hundred and seventy-two . . . authorizing the resurvey. . . ." Exh. 114, *supra,* Rep. of Surveyor Gen. of Nevada (1871–1872) at p. 7.

Thus, it appears that construction of a new line from Major's corner would, as the Special Master suggests, "defy all principles of law and logic." Special Master's Rep. 46.

IV

THE NORTH-SOUTH BOUNDARY BETWEEN CALIFORNIA AND NEVADA IS MARKED BY THE 120TH MERIDIAN WEST FROM GREENWICH AND NOT THE 43RD MERIDIAN WEST FROM WASHINGTON

California's eastern boundary from Oregon to Lake Tahoe was set by her constitution as the 120th meridian west from Greenwich, and California was admitted into the Union September 9, 1850, with that boundary. Exhs. 5, 6. Shortly afterward, Congress adopted a practice then fashionable in an age of nationalism, and provided that Washington, not Greenwich, should be this country's prime meridian for astronomical purposes. Exh. 186, Act of Sept. 28, 1850, ch. 53, 9 Stat. 513–515. This act was subsequently repealed in 1912 after limited use. 37 Stat. 342 (1912), exh. 201; see generally Culley, Meridians of Washington, exh. 200. Nevada's act of admission approved a description in her constitution providing, insofar as is relevant here, that her western boundary with California should extend ". . . to the forty third degree of Longitude West from Washington; thence North along said forty third degree of West Longitude, and said eastern boundary line of the State of California to the forty second degree of North Longitude . . . ." Exhs. 18–21.

What is generally recognized now but was apparently unknown to the constitutional draftsmen of Nevada was that the locations of the 120th meridian west from Greenwich and the 43rd meridian west from Washing-

ton were not located at exactly the same place. In fact, the 43rd meridian, if located on the ground, would be approximately 2.5 to 2.7 miles west of the 120th meridian. Exh. 42, memo, Foley to Legislative Counsel of Nevada, May 9, 1962; Nev. exh. PPPP, *supra*, Oregon Historical Quarterly; Defendant's Responses to Cal. 2nd Request for Admissions No. 80. However, during the time of the Nevada Territory and at the time of its statehood, these meridians were generally thought to be located at the same place. Exh. 42, *supra;* Nev. exh. PPPP, *supra;* exh. 192, De Groot's Map. Nev. and Cal. 1st set of Interrogatories.

DeGroot's Map represented both the 43rd meridian and the 120th meridian as being identical and as being the boundary between California and Nevada. This was the map used by Nevada Territorial Governor Orion Clemons during the negotiations to resolve the Honey Lake boundary controversy in 1863. Defendant's Response to Cal. 2nd Request for Admission, No. 81(c). Also, the First Directory of the Nevada Territory published in 1862 (exh. 191) equated the two meridians. Defendant's Response to Plaintiff's 2nd Request for Admissions, No. 81(e). Further, the reports of the Nevada Surveyor General, from the years 1865 through 1886, referred to this portion of the interstate boundary as being both the 43rd and the 120th meridians. Exhs. 189, 190, and 194 through 198, Nev. Surveyor General Reps.

The only reasonable explanation for the apparent discrepancy between the states' constitutionally created mutual boundary is that the locations of 120th and the

43rd meridians were thought to be identical. This is so for the reasons stated in the previous paragraph as well as for the reasons that both the Territory and the State of Nevada were *expressly* limited on the west by the State of California's eastern boundary. Exhs. 14, *supra*, 18, *supra*, 19, *supra*, 21 *supra* and Congress is expressly prohibited from taking land from one state and giving it to another. Art. IV, § 3, U.S. Const.; *Louisiana* v. *Mississippi, supra*, 202 U.S. 1; exh. 42, *supra*, Foley memo.

Therefore, any effort to grant territory lying within the boundaries of the State of California to the newly formed State of Nevada would have been unconstitutional. *Louisiana* v. *Mississippi, supra*, 202 U.S. 1; accord *Washington* v. *Oregon supra*, 211 U.S. 127.

Nevada, both during its territorial period and after statehood, did approach the State of California to seek a cession of California's territory located east of the dividing ridge or east of the Sierra Nevada but California rejected the overtures. Exhs. 28–37, 40–44.

Indeed, Nevada's first state governor acknowledged that Nevada's boundary must be limited by California.

> "An issue formerly existed between the State of California and the Territory of Nevada, as to the true location of the line dividing the two jurisdictions. We have defined our limits on the west by the eastern boundary of that State. Hence, the line has been established, unless negotiations with our sister State result in her relinquishment to us of the district in question, which would be of value to us and is of little importance to her." (1st Ann. Message of H. G. Blasdel, Governor of the State of Nev. exh. 32.)

Moreover, although the American Meridian System was adopted for astronomical purposes, the 43rd meridian has never been surveyed nor monumented as the interstate boundary between the states of California and Nevada (Defendant's Response to Plaintiff's 2nd Request for Admissions, No. 83; Landrum testimony, RT, pp. 325, 334) nor has it been used by either state as their mutual boundary. (Defendant's Response to Plaintiff's 2nd Request for Admissions, No. 84.)

V

THE COURT SHOULD ORDER A NEW SURVEY IF IT FINDS THAT THE VON SCHMIDT NORTH-SOUTH LINE AND THE UNITED STATES COAST AND GEODETIC SURVEY OBLIQUE LINE ARE NOT THE LAWFUL BOUNDARY

A. The court has inherent power to order a resurvey

Where the location of an interstate boundary is in dispute and where there is insufficient evidence to invoke the principle of acquiescence, the court has inherent power to order a resurvey. *Oklahoma* v. *Texas, supra*, 272 U.S. 21.

In *Oklahoma* v. *Texas, supra*, this court decided the location of the boundary between the states along the 100th meridian of longitude from the Red River to the parallel of 36° 30′ north latitude which constitutes the eastern boundary of the panhandle of Texas and the main western boundary of Oklahoma. Several surveys had been made of the 100th meridian between the years

of 1859 and 1902. Oklahoma and the United States, as intervenor, contended that the proper boundary was that line derived from an 1859 survey on the basis of res judicata of a previous judgment. Oklahoma also asserted that line on the basis of the doctrine of acquiesence and Texas maintained that the boundary should be a line running north from a monument set by the direction of Congress and approved by the Secretary of the Interior established in 1902 which fell eastward of the 1859 line.

This Court rejected the contention of Oklahoma and the United States that res judicata controlled. It rejected the contention of Texas because Congress did not authorize the running of a line northward from the approved monument; and it rejected the contention of Oklahoma based on acquiescence because the essential element of exercise of jurisdiction acquiesced in for a long period of years was lacking. This Court held that the boundary line was the true 100th meridian and ordered that the line be accurately located under the direction and approval of the Court.

It would seem, therefore, when the location of an interstate boundary line is still in doubt after all the evidence has been considered, the court has inherent power to order that a survey be made to determine the proper location of such boundary.

B. Modern surveying methods are capable of locating boundaries with great accuracy

During the fall of 1978, the California State Lands Commission requested the National Geodetic Survey (NGS) of the National Ocean Survey (NOS) to verify

the reported position of the 120th meridian of longitude as set forth in the Sinclair Report appended to the Report of the United States Coast and Geodetic Survey Annual Report of 1900. As a result of this request the NGS made astronomic determinations of three of the interstate boundary monuments in issue in this litigation in the vicinity of Lake Tahoe and filed a draft report with the California State Lands Commission. This report (exh. 239) illustrates the technology and techniques used by the United States government in making astronomic determinations of latitude and longitude, and their great accuracy compared to those used one hundred years ago.

Although there are several modern techniques designed for or capable of locating points generally on the earth with remarkable precision, of particular note is a new system which has revolutionized the measuring of geographical boundaries and which is well suited to locating the boundary in question. This system is called ARIES (Astronomical Radio Interferometric Earth Surveying) and was developed by the California Institute of Technology's Jet Propulsion Laboratory in conjunction with the National Aeronautics and Space Administration (NASA). Very simply, this system is a Very-Long-Baseline Interferometry (VLBI) technique which operates by measuring from two or more stations relative arrival times of radio signals transmitted by quasars and radio galaxies billions of light years away. Because ARIES is a radio astronomic technique and does not depend upon gravity as an earth reference, it is capable of making

extremely accurate geographic determinations free of the major sources of error caused by the gravitational force, the wobble of the earth's axis, and the inaccuracy of time signals typically associated with traditional optical methods. C. C. Counselman, III, Very-Long-Baseline Interferometry Techniques Applied to Problems of Geodesy, Geophysics, Planetary Science, Astronomy, and General Relativity, Proceedings of the IEEE (September 1973), vol. 61, No. 9, p. 1225; Peter F. MacDoran, *Radio Interferometry* for International Study of the Earthquake Mechanisms, Acta Astronautica (Pergamon Press 1974) vol. 1, pp. 1427–1444. It would appear that a precise survey of the constitutional boundaries could be made by this method.

VI

ASSUMING THIS COURT DECLARES THE BOUNDARIES OF CALIFORNIA TO BE THOSE RECOMMENDED BY THE SPECIAL MASTER, THE COAST AND GEODETIC SURVEY LINE SHOULD BE EXTENDED NORTHWESTERLY TO THE VON SCHMIDT LINE IN LAKE TAHOE

Although the actual 120th meridian may be joined with the 39th parallel as envisaged by the California Constitution of 1849, the lines which the Special Master recommends this Court adopt as the north-south and oblique boundaries may not. A visual depiction of the problem, and various ways in which the boundary may be joined within the Lake, is included in the appendix hereto as exhibit D.

The Special Master has recommended that California

and Nevada be given an opportunity to determine by agreement "the point in Lake Tahoe where the north and south line ends and the oblique line begins . . . subject to approval of this Court, . . ." and in the absence of such agreement, that he be empowered to hold further hearings and make recommendations thereto. Special Master's Report 49–50. Inasmuch as the record before the Special Master in this phase of the proceeding has been closed and the boundary question is still an open one until this Court makes its decision, California and Nevada have not attempted to reach formal agreement respecting such an intersection. However, should this Court adopt the boundary recommendations of the Special Master, California respectfully urges that its judgment provide additionally that the Coast and Geodetic Survey line be extended northwesterly until it reaches that point of intersection in Lake Tahoe concerned with the north-south line projected across the Lake by Von Schmidt in 1873. Such a solution would ensure the stability of each state's presently exercised jurisdiction over the shores of the Lake and would avoid the necessity to make any unsightly dog-legs within the Lake which would create additional angles obviously not contemplated by the makers of either state's constitution.

With this direction from the court, the parties may proceed to fix the location of such point and provide a precise description which may be incorporated within the court's final judgment.

Accordingly, it is recommended that the boundary

between the states of California and Nevada be determined and established to be the line known as the Von Schmidt line from its beginning at the intersection of the 42nd parallel of north latitude on the Oregon border and the 120th degree of longitude west from Greenwich, each as established by Allexey W. Von Schmidt in 1872, and extending southerly along the 120th degree of longitude as marked and determined by Von Schmidt in 1872 and 1873 to the point in Lake Tahoe where such Von Schmidt line intersects the northwesterly prolongation of a straight line known as the United States Coast and Geodetic Survey line as established by it from 1893–1899; then running in a south-easterly direction along said prolongation, and along said straight line to the point where the 35th parallel of north latitude intersects the centerline of the Colorado River as determined by compacts between Arizona-Nevada and California-Arizona. See exh. D, *Supra.*

VII

ONCE THE BOUNDARY IS ESTABLISHED, THIS COURT SHOULD RETAIN JURISDICTION TO DETERMINE THE STATUS OF LANDS SELECTED BY NEVADA WITHIN THE TERRITORY OF CALIFORNIA

A. Thousands of acres of public lands were selected unlawfully by Nevada from within the territory of California

Although the boundaries were definitively set in 1873 (with respect to the north-south line) and 1899 (as to the

oblique) the General land Office and its successor, Bureau of Land Management, inexplicably delayed closing their public land surveys on the new lines. E.g., exhs. 210–215, 217–231. As a result, Nevada continued blithely to select and sell thousands of acres of public lands known to her to be within California, with the apparent approval and consent of the federal government. E.g., Nevada Surveyor General's Report of 1911, exh. 232.

The record in this proceeding shows erroneous selections (primarily of internal improvement lands) by Nevada within the State of California as follows:

1. *Prior to May 1, 1873*

Prior to May 1, 1873, the State of Nevada selected 2,138 acres from Lake Tahoe north that were within the State of California as its boundaries are delineated by the "Von Schmidt" line. Affidavit of Fred Sledd, exh. 238. Although most of this land was patented to private individuals, several parcels are still held by the State of Nevada. Exh. 209.

Although federal approval of these selections might have been justified by mistaken reliance on the "Houghton-Ives" line of 1863, the validity of these selections, and patents issued thereon, is in grave doubt. *Coffce* v. *Groover, supra,* 123 U.S. 1.

2. *After May 1, 1873*

Even more incomprehensible is the fact that the United States General Land Office and its successor, the Bureau of Land Management, continued to ratify and

approve selections by the State of Nevada within California as delineated by the Von Schmidt line (a line established and accepted by the United States May 1, 1873) after it had accepted the Von Schmidt line as the California-Nevada boundary. E.g., exhs. 209, 232; Defendant's Answers to Plaintiff's Second Set of Interrogatories 49, 50, with exhibits. From Lake Tahoe north to the Oregon border, some 1,484.60 acres were released by the United States without authority of law to the State of Nevada even though this land was located in the State of California by federal survey contracted for and accepted by the United States. Exhs. 209, 236, 237, 238.

Although our researches with respect to the boundary from Lake Tahoe southeasterly to the Colorado River are not completed, it is anticipated that similar findings will be made with respect to Nevada selections there. We have already discovered that some 2,000 acres of land directly south of Lake Tahoe were unlawfully selected by the State of Nevada with the approval of the United States. Exh. 237.

This situation will be exacerbated, of course, if as Nevada urges, a new survey is to be ordered from the point established by Daniel Major on the California-Oregon border. See defendant's counterclaim, count II. Plaintiff's researches of the California-Nevada selections indicate that if a "Major's line" were to be surveyed, the title to some 34,040 acres of land from Lake Tahoe to the Oregon border selected by California from the public domain or granted to her as school lands and approved by the General Land Office would be in question. Along

the border from Lake Tahoe southeasterly to the Colorado River, 13,894 acres would be similarly in jeopardy. Exhs. 209, 238.

Confusion runs rampant even today. The Department of Interior has taken the position, in a formal ruling, that school lands cleared to California but relocated within Nevada by a subsequent survey were, in effect, never school lands at all. E.g., *In re Pellkofer,* plaintiff's exh. 216. That the department is less then certain about its theory is evidenced by a communication from its Bureau of Land Management as late as November 1978, identifying a similar parcel and asking the California State Lands Commission its views with respect to its status. Exhs. 233, 234. Similar confusion exists with respect to a school land parcel confirmed to California by the Department of the Interior in 1910 and reconfirmed in 1960 even though the Bureau of Land Management granted a right of way over it to the Nevada Department of Highways in 1953. This parcel is recognized as California property by the assessor's office of Esmeralda County, Nevada, which is now threatening to sell it for nonpayment of taxes. Affidavit of F. D. Uzes, exh. H to Plaintiff's Motion to File Amended Complaint and to Bifurcate Issues.

B. Holdings of the United States Supreme Court and the Department of the Interior alike indicate that selections of public lands not made within the proper state are invalid and remain in the public domain

There is substantial authority to the effect that the selections and school land grants of Nevada within the

State of California and California within Nevada (as their boundaries were subsequently determined by the Von Schmidt survey north of Lake Tahoe and the U.S. Coast & Geodetic Survey south of that lake), may be invalid and therefore the land may still be within the public domain. The latest authority to this effect comes from the Department of the Interior itself in the form of *In re Pellkofer,* decision No. A-29832, August 29, 1968, exhibit 216 herein. In the *Pellkofer* case, applicant applied to the Bureau of Land Management for a right of way across what he alleged to be public domain situated in the State of Nevada. The bureau rejected the application on the ground that it lacked jurisdiction over that section because it had passed to California as school lands. The parcel in question was located in California by the Von Schmidt and Baker surveys of 1873 and 1884. However, when the oblique California-Nevada boundary was resurveyed by the U.S. Coast & Geodetic Survey, it was relocated on the Nevada side of the boundary. *Ibid.* On appeal, the Department of the Interior held that the lands in question had never passed to the State of California but remained in the public domain because of their subsequent location within Nevada. "Since the School Land Grant conveyed to California only the school sections within its boundaries, it follows, of course, that if this section 36 was not in California, as it was not, it did not pass to the state upon the acceptance on the plat survey." *Ibid.*

Of even greater concern are the earlier decisions of this Court with respect to the validity of grants made by

states of lands subsequently determined to be outside their boundaries. In *Coffee* v. *Groover, supra,* 123 U.S. at p. 1, this Court held that a patent issued by the State of Georgia under what was then mutually (but mistakenly) assumed by Georgia and Florida to be the interstate boundary was invalid, and that a subsequent Florida patent under a swamp and overflow lands grant derived from the United States prevailed. This Court flatly stated such grants are invalid if they are made beyond the territory of the grantor. *Id.,* at pp. 21–23. See also *Poole* v. *Fleeger* (1887) 36 U.S. (11 Peters) 185, holding that grants by states which, when made, were actually beyond the territorial boundary were unlawful even if a compact subsequently established that line as the lawful boundary.

C. The United States should be invited to intervene; if she declines to do so, she should be joined in this proceeding

California has repeatedly pointed out the significance of this proceeding to the Departments of Justice and Interior. At issue are the authority of the federal government to make interstate boundary surveys, the validity of United States clear-listings and patents made in reliance thereon and the effect of a federal administrative ruling which sheds doubt on the title to thousands of acres of land. Informal efforts to obtain the participation of the Department of the Interior have been fruitless. Communications from the California State Lands Commission, the California Attorney General, and virtually the entire California congressional delegation have met

with no response. Exhs. K–Q to Plaintiff's Motion to File Amended Complaint herein.

The interests of innocent purchasers as well as the states concerned requires that the status of titles be decided in this matter. Accordingly, California filed a motion requesting leave to file its second amended complaint to (1) add the United States as a necessary party; (2) obtain declaratory and quiet title relief with respect to (a) those parcels shown in record ownership of the State of California which are now apparently claimed by the United States to be the public lands in reliance upon subsequent surveys (e.g., *Pellkofer, supra*); (b) those parcels claimed by successors in interest of the State of California, represented by this State as parens patriae; and (c) those parcels within the State of California unlawfully granted to the State of Nevada; and (3) mandate the Secretary of the Interior to authorize selection by California of public domain lands within its borders to replace those that were unlawfully given Nevada. The Special Master has recommended that this motion be allowed. Special Master's Report 50.

The propriety of participation of the United States in a proceeding of this nature is well established. In *Texas* v. *Louisiana* (1972) 410 U.S. 702, it became apparent in the course of an interstate boundary dispute that the United States might have an interest in certain islands in the west half of the Sabine River. See Special Master's Report, *Texas* v. *Louisiana,* No. 36. Original, pp. 15–16 (Oct. Term, 1974). This Court thereupon invited the United States to participate in a second hearing for

determination of such interest. *Texas* v. *Louisiana, supra.*

Additional precedent for such appearance exists in *Florida* v. *Georgia* (1854) 58 U.S. (17 How.) 478. There, the United States Attorney General actively petitioned for leave to intervene in an interstate boundary dispute on grounds strikingly similar to those existing here:

1. The validity of federal patents to individuals were at stake. "Here is responsibility of (the United States) to its grantees." *Id.,* at p. 481.

2. ". . . [T]o see that the ease is fully and well tried, with all just defenses fully before the court . . . ." *Id.,* pp. 481–482.

3. "The United States have a general interest in the question of the boundaries of states, because of sundry political or legislative relations of the subject; as, for instance, apportionment of members of the house of representatives, collection districts, judicial districts, and many other things having reference to the boundaries of states." *Id.,* at p. 481.

4. As the states cannot change their boundaries by agreement without the consent of Congress, ". . . they ought not to be permitted to alter that boundary in the suit pending, either by possible mispleading, mistake in pleading, omission of pleading, or direct confession, or by omission of evidence . . . ." *Id.,* at p. 482.

Chief Justice Taney, writing for the majority, ruled that the United States should be permitted to intervene informally, inasmuch as it had a duty on behalf of the other states to examine into the subject, particularly

where a judgment in such action would bind the United States. *Id.,* at pp. 493, 494.

The United States could properly intervene as a plaintiff in this action. E.g., *United States* v. *Texas* (1950) 339 U.S. 707. Having refused to do so, it may be joined as a defendant. Fed. Rules Civ. Proc. 19(a). And this Court clearly may invite it to participate. See Special Master's Report 50. Such an invitation could be much more persuasive than were the fruitless pleas of California.

D. The court should proceed to determine the boundary issues and retain jurisdiction over the question of validity of California's and Nevada's selection of school lands and the possible federal interest therein

California is eager to avoid delay of the central issue of determination of the proper location of the California-Nevada boundary. It will not be necessary to delay such a decision because of the filing of a second amended complaint or because the United States is invited to express her views on the status of Nevada's lawless selections. Under similar circumstances, Justice Black pointed out that this Court could, after determining in general the ownership of an area, hold later hearings as necessary to determine the status of specific segments with more particularity. *United States* v. *California* (1947) 332 U.S. 19, 25–26. Indeed, ample precedent exists for such a procedure. In *Texas* v. *Louisiana, supra,* 410 U.S. at p. 714, this Court invited the United States to participate in a second hearing when it determined that there was a possible federal interest in certain lands. See Special Master's Report, *Texas* v.

Louisiana, No. 36, original, pp. 15–16 (Oct. Term. 1974). Determination of the initial boundary question will shape the character and nature of the issues raised in plaintiff's proposed second amended complaint. Abandonment of the case after such a determination would leave the rights of many innocent persons undetermined and lead to multiple litigation. Therefore, it is respectfully requested that this Court authorize the Special Master, as he suggests, to hold conferences and hearings as necessary to determine the interests of the United States, if any, and whether the United States should be made a party. Special Master's Report, Recommendation 5, p. 50. In the event such conferences and hearings indicate the necessity for filing a second amended complaint and joinder of the United States, an appropriate order can be entered.

CONCLUSION

In her amended answer and counterclaim and her briefs before the Special Master, Nevada eloquently describes the confusion and color of the early days of the far west. But none of the facts she sets forth justify moving the states' 106-year-old boundaries.

The alternatives suggested by Nevada are simple: The states authorized a survey in 1863, and it was completed —at least up to 103 or more miles south of Lake Tahoe. Readopt the Houghton-Ives line, urges Nevada. Recover the lost monuments and finish the survey abandoned south of Lake Tahoe over a hundred years ago. No matter that the Houghton-Ives line was replaced by a new

one in 1873—one on which the citizens of both states have relied in the conduct of their affair ever since. No matter that the Nevada Surveyor General welcomed the new Von Schmidt line on behalf of his state with the words "The boundaries of the state now seem to be permanent . . . ." Exh. 138.

If this first alternative will not do, urges Nevada, make a new survey, utilizing a meridian only partially in use at any time, and abandoned in the late nineteen hundreds. Resurrect the 43rd meridian west and survey it from the Oregon border to the Colorado River. This is the first time in history that this suggestion has been made. It was never even thought of in the early days when the border was unsettled and Nevada's Constitution was new. Why was it never proposed then? Could it be that, as Nevada's State Constitution suggests, Congress believed the 43rd west to be coterminous with the existing eastern boundary of California? And could that explain why California's relatively powerful congressional delegation failed to oppose an act of admission that it is now suggested, moved Nevada's line nearly three miles into California's territory?

If these theories will not do, resourcefulness leads our sister state to another. In 1868, Daniel Major in surveying the California-Oregon border, identified a point which he believed to be the intersection of the 120th meridian and the 42nd degree of latitude. Of course Major was a federal surveyor, but Nevada is willing to forego its constitutional objection to federal surveys in this instance. All we have to do, suggests Nevada, is to

begin at Major's point and make a new survey from Oregon to the Colorado. No matter here that Major's job was to survey the Oregon border, not the California-Nevada one. And it is only a slight embarrassment that when the General Land Office hired Allexey Von Schmidt to survey the line at issue, and instructed him to use Major's point, he diligently attempted to do so and found it to be inaccurate; whereupon his principals excused him from using this point and accepted his survey based on another placement of the 120th meridian.

Last, but not least, the existing oblique boundary line is objectionable to Nevada on additional grounds. Although this is a line both states recognized in fact and by statute (at least until last year, when Nevada repealed hers), it is suggested the Coast and Geodetic Survey's work was prompted by California's "dubious" motives, and the survey was unconstitutional. No matter that here Nevada gained some 256 square miles by that survey and that, once again, both states have recognized this line since its completion in 1899.

Nevada's answering brief represents an earnest and unabashed effort to assert every possible theory that could result in additional territory for that state. None of her theories, however, are supported by the facts or the law in this case.

We respectfully submit that the time has come to put this matter to rest. For 106 years in the north and 80 years in the south the states have respected the boundary marked on the ground between California and Nevada. Nevada's long-dormant desire for a verdant

segment of the Sierra Nevadas may be understandable but must be rejected. The Special Master's Report should be accepted.

Should this Court reject the presently observed lines, a readily available alternative exists for defining the interstate boundary—a new survey. For there is clearly only one interstate boundary—that set out in California's 1849 Constitution. And it would be a relatively simple matter today to fix it astronomically and to mark it on the ground.

Finally, the United States, the party responsible for the surveys now questioned and for authorizing the selections the validity of which has been placed in doubt by its own subsequent statutory constructions, should be invited to assist in cleaning up after a controversy so largely originating from its own actions and inactions. Only when the validity of Nevada's selections within California has been clarified will this case finally be at an end.

The ramifications of *California* v. *Nevada* on the status of border lands are far-reaching. If school lands and selections were in fact invalid because of erroneous placements of the boundary, these facts should be ascertained as soon as possible so that steps can be taken to protect innocent persons by legislative and administrative action. If, contrary to the Department of Interior's views, the later federal boundary surveys had no effect on prior grants, a ruling to that effect should be made at a later stage in this proceeding. The United States should be invited to participate in this proceeding and jurisdiction

should be retained for a later determination of federal as against state and private interests in the affected border lands.

Respectfully submitted,

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State of California

CALIFORNIA BOUNDARIES AS SET FORTH IN THE CONSTITUTION OF 1849

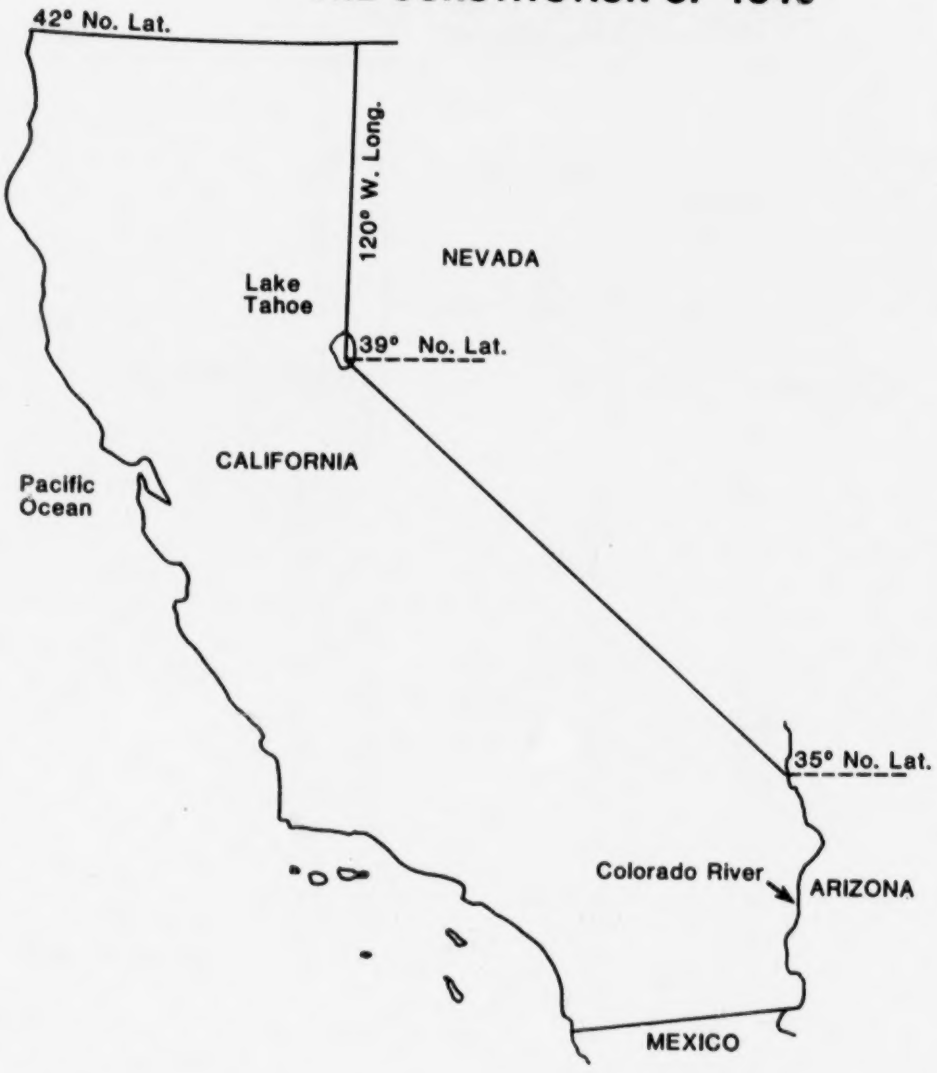


EXHIBIT A

LINES AT ISSUE IN VICINITY OF 42° NORTH LATITUDE

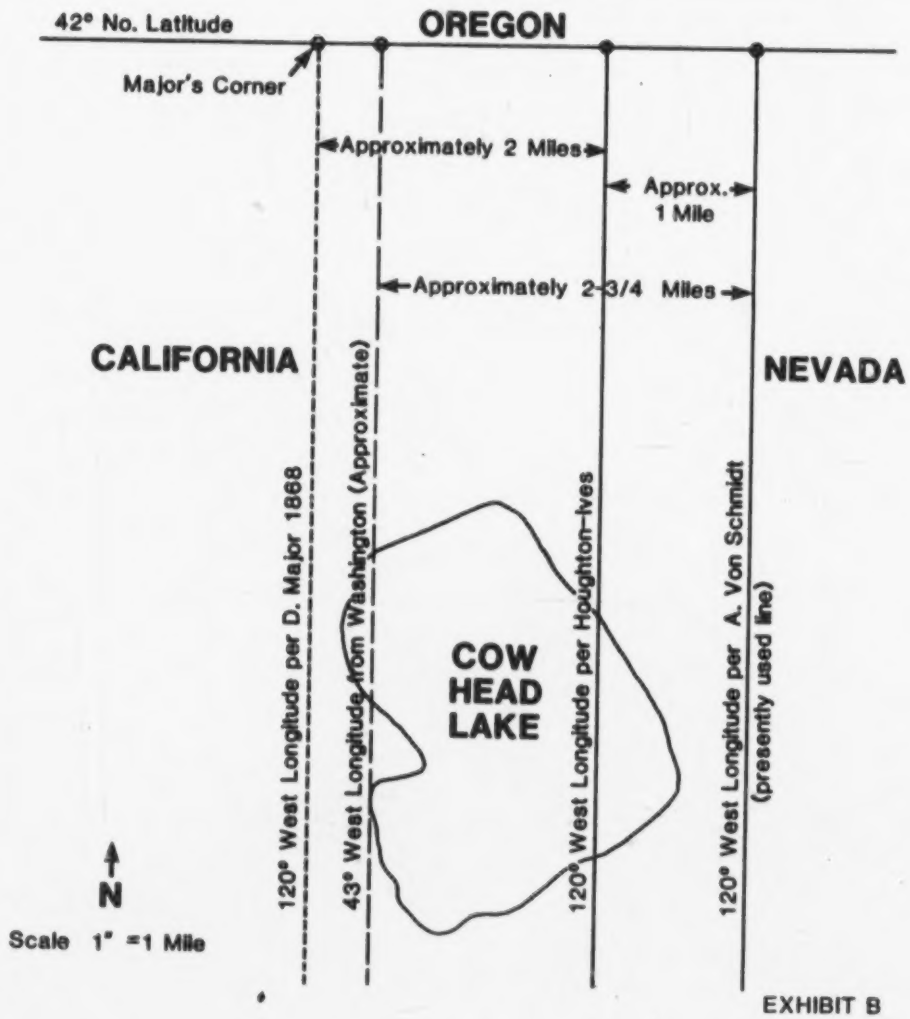


EXHIBIT B

OBLIQUE LINES AT ISSUE AT LAKE TAHOE

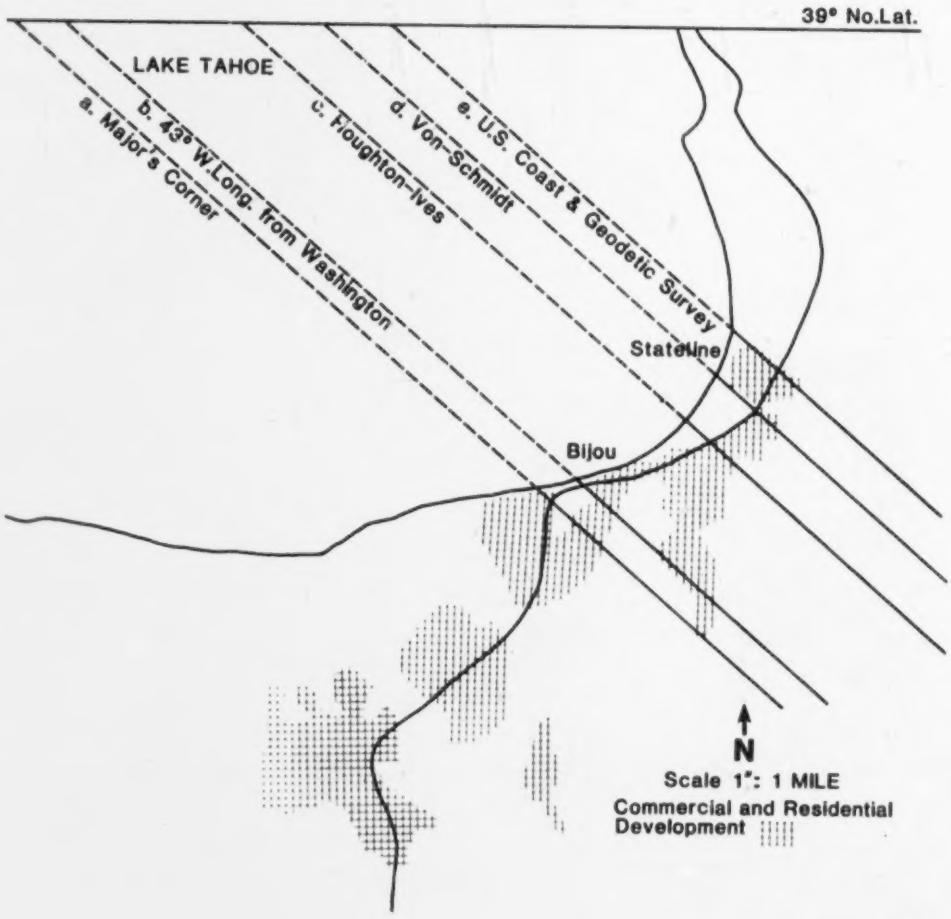


EXHIBIT C

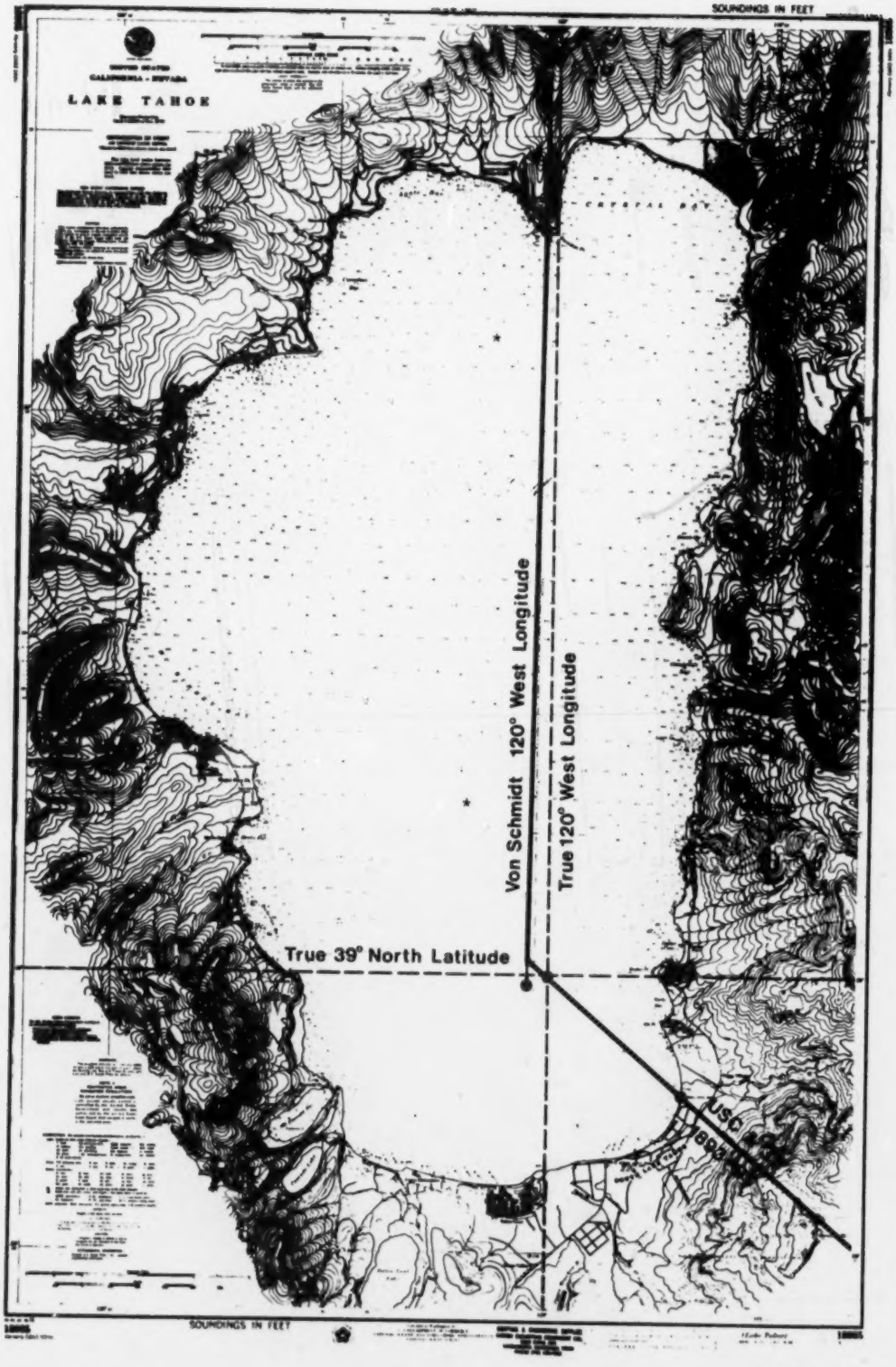

SOUNDINGS IN FEET
LAKE TAHOE
CRYSTAL BAY
Von Schmidt 120° West Longitude
True 120° West Longitude
True 39° North Latitude
USC & GS
1860
SOUNDINGS IN FEET

EXHIBIT D